IN THE SUPREME COURT OF THE STATE OF DELAWARE

BOBBY L. MONROE,	§	No. 372, 2009
	§	
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	Cr. I.D. No. 0706000335
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: October 13, 2010
Decided: December 8, 2010

Before **STEELE**, Chief Justice, **HOLLAND** and **JACOBS**, Justices.

O R D E R

This 8th day of December 2010, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Bobby L. Monroe ("Monroe"), the defendant below, appeals from a Superior Court final judgment of conviction. A Superior Court jury found Monroe guilty of two counts of Burglary in the Third Degree,[1] one count of Felony Criminal Mischief,[2] and two counts of Misdemeanor Theft.[3] On appeal, Monroe claims that his right to a fair trial by an impartial jury under the Sixth Amendment

[1] 11 *Del. C.* § 824.

[2] 11 *Del. C.* § 811.

[3] 11 *Del. C.* § 841.

of the United States Constitution and Article I, § 7 of the Delaware Constitution was infringed, because of juror bias. We find no error and affirm.

2. Monroe was arrested for a series of burglaries occurring between April 10, 2007 and May 22, 2007. He was indicted on five counts of third-degree burglary, three counts of felony theft, two counts of misdemeanor theft, one count of felony criminal mischief, one count of theft of a motor vehicle, and six counts of second-degree conspiracy. The Superior Court held a three-day trial from March 31 to April 2, 2009. At the conclusion of the State's case, Monroe moved for judgment of acquittal on all charges, which the trial court denied. The jury returned a guilty verdict on five of the charges, and acquitted the defendant on the remaining sixteen.

3. Several hours after the jury returned the verdict, a juror contacted the Superior Court chambers, and informed the trial judge that she had seen Monroe at her apartment complex, located at 320 Shipley Road in Wilmington (the "Shipley complex"), shortly after the jury reached its verdict. By letter that same day, the trial judge notified Monroe's defense counsel of the juror's allegations, and ordered Monroe to "stay away from the juror's apartment complex." According to the trial judge, "[t]he juror reported that [Monroe], apparently, has a friend in the place where the juror lives and, much to the juror's discomfort, [Monroe] came

by." There was no additional information regarding the juror's knowledge of Monroe.

4. Neither Monroe nor his trial counsel informed the trial court about Monroe's discomfort with the juror, or about her potential bias against him, until Monroe's sentencing hearing on May 29, 2009. At that hearing, Monroe stated that he lived at the Shipley complex with his girlfriend, Avagay Green.[4] Monroe asserted that he had not been at the Shipley complex on April 2nd, however, because after the jury returned its verdict, his stepsister immediately drove him to Newark, from where he then left for Maryland. Monroe speculated that the juror knew him and Green, that she was biased against him, and that she intentionally failed to inform the court that she knew that he and Green lived in her apartment complex.

5. As the trial judge noted, the preliminary evidence showed only that the juror saw Monroe at the Shipley complex and that the juror thought Monroe was visiting a friend there after the trial. Nevertheless, the trial judge decided to leave the record open for thirty days to allow Monroe and his defense counsel to investigate the possibility of juror bias and move for a new trial. The trial judge then sentenced Monroe without objection from the defense.

[4] At trial, Green testified that Monroe had been living with her in her apartment at the Shipley complex since May 2007.

6. By letter dated June 23, 2009, Monroe's trial counsel informed the court that Monroe would not be moving for a new trial. Trial counsel reported that he had investigated the potential juror bias, but found no basis on which "to challenge the validity of the verdict as contemplated by Delaware Rule of Evidence 606(b)."

7. On appeal, Monroe's trial counsel filed a brief and moved to withdraw pursuant to Rule 26(c).[5] In that brief, trial counsel included a letter from Monroe listing several issues he (Monroe) wished to raise on appeal. This Court granted trial counsel's motion to withdraw on April 13, 2010, and new appellate counsel was appointed. This appeal followed.

8. Monroe seeks reversal of his convictions on the ground that he was denied his constitutional right to a fair trial by an impartial jury under the Sixth Amendment of the United States, and Article I, § 7 of the Delaware, Constitutions, because of juror bias. He asks this Court to grant him a new trial. Monroe contends that the juror knew he lived in the same apartment building, but yet still continued to serve as a juror. That amounted to juror bias, Monroe argues, because the juror improperly influenced the other members of the jury during deliberations.

[5] DEL. SUP. CT. R. 26(c).

9. This Court generally reviews *de novo* claims of alleged constitutional violations.[6] Monroe's claim, however, is reviewed only for plain error because although he raised the issue of potential juror bias at his sentencing hearing, he failed to move for a new trial.[7] Under the "plain error" doctrine, we are "limited to material defects which are apparent on the face of the record, which are basic, serious, and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice."[8]

10. Although Monroe purports to rely on both the United States and Delaware Constitutions, he has made no legal argument, or cited any authority, to support his conclusory statement that his rights under the Delaware Constitution were violated. Monroe refers to Article I, § 7 of the Delaware Constitution in the Summary of Argument section of his opening brief, but fails to address the merits of his Delaware Constitutional claim in the Argument itself.[9] This Court has consistently declined to consider state constitutional claims that the appellant has

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[6] *Grace v. State*, 658 A.2d 1011, 1015 (Del. 1995).

[7] DEL. SUP. CT. R. 8; *see also Cruz v. State*, 990 A.2d 409, 412 (Del. 2010).

[8] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

[9] Under Delaware Supreme Court Rule 14, an appellant must raise and argue claims of error in both the Summary of Argument and the Argument portions of his opening brief. DEL. SUP. CT. R. 14(b)(iv), (vi); *Roca v. E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1242 (Del. 2004) ("It is well established that 'to assure consideration of an issue by the court, the appellant must both raise it in [the Summary of the Argument] and pursue it in the Argument portion of the brief.'") (internal citation omitted).

failed to support other than with conclusory assertions.[10] "The proper presentation of an alleged violation of the Delaware Constitution should include a discussion and analysis of one or more of the criteria set forth in *Jones* [*v. State*[11]] or other applicable criteria."[12] Failure to do that operates as a waiver of the claim.[13] Accordingly, to raise a cognizable claim under the Delaware Constitution (here, that the Delaware Constitution provides greater protection than the United States

[10] *Ortiz v. State*, 869 A.2d 285, 290-91 (Del. 2005) (noting that a defendant's claim under Article I, § 7 of the Delaware Constitution is waived where the defendant makes only a conclusory declaration of such violation in his opening brief); *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993) (holding that a defendant's claim under the Fourth Amendment was waived where the defendant failed to dispute the Superior Court's factual finding that he voluntarily consented to the search and seizure in the text of his opening brief).

[11] 745 A.2d 856, 864-65 (Del. 1999). In *Jones*, the defendant argued that the Fourth Amendment and Article I, § 7 of the Delaware Constitution provided separate protections against unlawful search and seizure. *Id.* at 861. Although the Fourth Amendment, and Article I, § 7 of the Delaware Constitution contain similar language, this Court concluded that the Delaware Constitution provided more protection than the Fourth Amendment. *Id.* In arriving at that conclusion, we examined the following criteria, including: textual language, legislative history, preexisting state law, structural differences, matters of particular state interest or local concern, state traditions, and public attitudes, "for determining whether a provision in the United States Constitution has a meaning identical to a similar provision on the same subject in a state's constitution." *Id.* at 864.

[12] *Ortiz*, 869 A.2d at 291, n.4. *See also Jenkins v. State*, 970 A.2d 154, 158 (Del. 2009) (explaining that a defendant must "discuss and analyze" one or more of the criteria set forth in *Jones*); *Wallace v. State*, 956 A.2d 630, 637-38 (Del. 2008) (same).

[13] DEL. SUP. CT. R. 14(b)(vi)(A)(3) ("The merits of any argument that is not raised in the body of the opening brief [is] deemed waived and will not be considered by the Court on appeal."); *see also Ortiz*, 869 A.2d at 291 (noting that the "alleged violation of the Delaware Constitution will not be addressed because it was not fully and fairly presented to this Court as an issue on appeal."); *Murphy*, 632 A.2d at 1152 (holding that "[t]he failure to raise a legal issue in the text of the opening brief generally constitutes a waiver of that claim on appeal.").

Constitution),[14] Monroe must include an analysis of the *Jones* criteria in both the Summary of Argument and the Argument portions of his opening brief. Because he has not done that, Monroe has not fully and fairly presented his Delaware constitutional claim to this Court, and we decline to address it. We address only his Sixth Amendment claim.

11. Monroe's Sixth Amendment claim lacks merit, because Monroe has not established plain error. Although juror bias will not be tolerated,[15] for this Court to overturn a jury verdict, Monroe must show "actual prejudice"[16] or that "the circumstances surrounding the [juror] misconduct were so egregious and inherently prejudicial so as to support a presumption of prejudice."[17] Relying on our decision in *Hughes v. State*, Monroe asserts that he does not have to show actual prejudice, because the juror bias here constituted "egregious circumstances," in which case prejudice should be presumed.[18] In *Hughes*, we held that juror impartiality was impermissibly tainted when several jurors knew, before trial, about the defendant's

[14] For example, this Court has held that for jury trials, Article I, § 7 of the Delaware Constitution can provide greater protection than the Sixth Amendment where the latter is silent on the issue of juror substitution. *See Claudio v. State*, 585 A.2d 1278 (Del. 1991).

[15] *Massey v. State*, 541 A.2d 1254, 1256-57 (Del. 1988).

[16] *Hughes v. State*, 490 A.2d 1034, 1043 (Del. 1985).

[17] *Massey*, 541 A.2d at 1255.

[18] *See Hughes*, 490 A.2d at 1046 ("However, under egregious circumstances such as those presented here, the law raises a presumption of prejudice and, consequently, a violation of due process, in favor of the defendant.").

prior convictions for the same offense and informed the rest of the jury during their deliberations.[19] We concluded that "[o]nce [the jurors] acquired new, extremely prejudicial information, their ability to remain impartial became inherently suspect."[20]

12. Here, unlike *Hughes*, the facts do not rise to the level of "egregious circumstances." Monroe speculates that the juror was inherently biased because she lived in the same apartment complex, but he provides no evidentiary or legal support for his theory. Monroe cites no authority to support his claim that simply living in the same building as the defendant is inherently prejudicial.[21] Further, nothing in the record shows that the juror knew Monroe or had encountered him

[19] *Id.* at 1040-43; *see also id*. at 1044 ("[W]e are hard-pressed to think of anything more damning to an accused than information that a jury had previously convicted him for the crime charged.") (quoting *United States v. Williams*, 568 F.2d 464, 471 (5th Cir. 1978)).

[20] *Id.* at 1045.

[21] The Southern District of New York has held that even if a juror potentially recognizes a defendant, that is not inherently prejudicial. *Ayuso v. Artuz*, 2001 WL 246437, at *6 (S.D.N.Y. 2001) (concluding that it was not an abuse of discretion to deny a motion for new trial where a juror stated that the defendant looked familiar because the two lived in the same neighborhood, because "there is no nexus between the possible recognition of [the defendant] from the neighborhood and [defendant's] involvement in the crime."). *See also Owen v. Hood*, 41 F.3d 1513 (Table), 1994 WL 622975, at *3 (9th Cir. 1994) (holding that defendant's right to a fair and impartial jury was not violated where the trial court refused to excuse a juror who lived in the same neighborhood as a police officer involved in the case, and had also gone to school with another officer also involved in the case); *Pursell v. Horn*, 187 F.Supp.2d 260, 316 (W.D. Pa. 2002) ("The mere fact that [the juror] had a past [legal] relationship with the [district attorney] was not enough under Pennsylvania law to obtain a reversal of the trial court's ruling."); *Commonwealth v. Bright*, 420 A.2d 714, 716-17 (Pa. Super. Ct. 1980) (holding that there was no ground to exclude a juror merely because he lived in the same neighborhood as the prosecutor and had known the prosecutor since childhood).

before the trial. Because the juror did not see Monroe at the Shipley complex until after the verdict was returned, no "bias" could have occurred before or during the jury deliberations. Moreover, Monroe's trial counsel investigated the potential juror bias claim, and independently concluded there was insufficient evidence to challenge the validity of the verdict. Because the circumstances here were not inherently prejudicial, and Monroe has failed to show actual prejudice, his claim must be rejected.

NOW, THEREFORE, IT IS ORDERED that the judgments of the Superior Court are **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice